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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRANDT STITES, Plaintiff and Appellant, v. HILTON HOTELS CORPORATION et al., Defendants and Respondents.	B209485 (Los Angeles County Super. Ct. No. BC354709)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Lynch, David Workman and Richard E. Rico, Judges. Affirmed.

Aaron Stites for Plaintiff and Appellant.

Bryan Cave, Jonathan Solish, Glenn J. Plattner, Shelly Gopaul for Defendants and Respondents.

Appellant Brandt Stites claims that his rights were violated when he was denied a hotel room because he was accompanied by a disabled person with a service dog. The trial court granted respondents' motion for summary judgment. We affirm. Appellant did not produce any evidence showing that respondents own, operate, or control the hotel where he was denied accommodations. Rather, the hotel in question is owned and operated by a franchisee. Respondents cannot be held vicariously liable for the actions of a third party franchisee, where appellant failed to show (1) an actual or ostensible agency relationship between respondents and the franchisee, or (2) that respondents hired, trained or supervised the desk clerk who denied appellant accommodations. Further, the trial court did not abuse its discretion by denying appellant's request for a continuance.

FACTS

The Complaint

Appellant filed his lawsuit in June 2006. After several amendments, the operative pleading asserts that in April 2006, appellant entered a Hilton Hotel located in San Clemente with a disabled family member and a properly identified assistance animal. He was allegedly denied a room and told to leave, even after advising a hotel employee that the law requires accommodation of a disabled person with a service animal. Appellant asserts claims for violation of the Unruh Act and negligent employee training, and waives his other causes of action.

The Claimed Incident of Discrimination

On April 15, 2006, appellant arrived at the Hampton Inn in San Clemente (the Inn) with his brother Aaron Stites, a cousin, and a dog. The dog did not have a service cape, but (according to appellant) wore a leash, harness and dog tag on his collar. Aaron Stites declares that he has a form of muscular dystrophy. Since 2006, he has used "Duke," a Great Dane, to help him maintain mobility. Duke has a county dog tag, and Aaron Stites asked appellant to tape onto the dog collar a paper identifying Duke as a service dog.

Appellant and his companions made no advance reservations, and selected the Inn upon their arrival in San Clemente, but *not* because it was associated with respondents. The desk clerk at the Inn informed them that they must produce proof that the dog is

medically necessary, and he refused to examine Duke's collar to see his service dog certificate. After being denied accommodations, appellant and his companions departed from the Inn. They obtained a room at a hotel next door to the Inn, where they spent the night.

The desk clerk on duty at the Inn, Daniel Powers, recalled the incident. Powers noticed that "a dog walked into the hotel and it was not on a leash. And our hotel typically doesn't allow pets unless they are service animals." It was a big dog "just roaming through the lobby," sniffing the Inn's clientele. According to Powers, the dog was not wearing a special service vest, or a harness, or even a collar, nothing that would indicate that it was a service dog. A guest at the Inn seemed afraid of the dog and shielded her child from it.

The person with the dog cut in front of the line, butting aside a client that Powers was assisting. He claimed the dog was a service animal, and became angry and uttered obscenities when Powers asked him to leash the dog. The man did not appear to be disabled, nor did he say that he suffered from a disability. He was wearing only swim trunks and smelled strongly of alcohol. He did not ask Powers to examine the dog's collar, and only said, "I don't have to provide any fucking proof" of a disability. As the man departed, he yelled, "I'm going to sue this fucking place, and I'm going to sue every fucking hotel on the street." Later, Powers told the manager that he refused to rent a room to the man because he was "drunk and surly."

Powers recalled that the drunken individual's companion "never came inside the lobby [and] just kind of stood outside the whole time that this took place." Powers indicated that he "would never turn somebody away for simply having a disability": rooms are available at the Inn "that are specifically designed for people who have disabilities. We try to cater to that." He has checked in other guests who had service dogs. Powers did not recall whether he received any training at the Inn regarding service dogs.

The Named Defendants

In his pleadings, appellant names a dozen corporate defendants, including respondents Hilton Hotels Corporation (Hilton) and Promus Hotel Corporation (Promus).[1] Promus is a subsidiary of Hilton. The identity of the defendant responsible for appellant's damages is the subject of respondents' motion for summary judgment. Respondents argue that they are not liable because they have no connection with plaintiff's claim. According to a Hilton vice-president and senior counsel, Hilton "was the parent company for the Hilton family of brands, including Hampton Inn." However, Hilton "did not own, operate or franchise the San Clemente Hampton Inn."

The Inn is owned and operated by QSSC, LLC (QSSC), under a 2003 franchise agreement with Promus Hotels, Inc. Hotel franchisees either build or purchase their hotel properties and determine whether to run them as independent hotels or associate them with a particular brand. The franchisee hires, trains, supervises and disciplines its employees, including its desk clerk. Respondents have no control over the day-to-day activities of the Inn, nor did they train any employees at the Inn.

Under the terms of the franchise agreement, QSSC is "an independent contractor," not an agent of the franchisor, which has no power to direct or supervise the daily affairs of QSSC. As part of its obligations as a franchisee, QSSC is required to comply with all local, state and federal laws. Hilton and Promus have corporate policies permitting disabled guests with service animals to stay at their hotels. The franchisor sets policies and standards for the Hampton Inn brand. These policies require franchisees to follow the Americans With Disabilities Act, and training materials emphasize compliance with this law.

At his deposition, appellant stated that he sued QSSC because it is the franchisee, although he maintained that respondents "own" the Inn.[2] Appellant contends that "Hilton

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[1] Appellant does not contest summary judgment as to the 10 other defendants, including the franchisor, Promus Hotels, Inc.

[2] Stites indicates in his brief that he has settled his claims against QSSC.

has strong centralized management and it exercises the same extensive control over all of the operations at its franchised hotels as it does at its owned/managed hotels." He points to Hilton's "brand standard" manual—which is used at all Hilton hotels—as "evidence of sufficient control." As a result of Hilton's extensive control, appellant declares, "it is effectively an operator of the hotels, whether franchised or company owned/operated." Appellant makes the same argument with respect to Promus.

Aaron Stites declares that "Between 1998 and 2000, I was discriminated against at seven different Hilton/Promus hotels in three different states." He does not specify the grounds for the discrimination, though it could not have involved the service dog he has used since 2006. His declaration does not show that respondents owned, operated or controlled the Inn in April 2006, when the alleged incident occurred. Appellant relies on his own declaration as proof that respondents are liable for the wrongful acts of the franchisee. He states, "Hilton is responsible for the acts of the San Clemente Hampton Inn because it ratified the wrongful discrimination and because Hilton's policies and procedures are the same at all of its hotels (regardless of whether the property is owned, operated, or managed)."

The Trial Court's Ruling

The court granted respondents' motion for summary judgment. The court rejected all of appellant's claims because respondents "did not own and operate the Hampton Inn in San Clemente" Judgment was entered in favor of respondents on June 16, 2008. The appeal is timely.

DISCUSSION

1. Appeal and Review

The judgment for respondents is final and appealable. (Code Civ. Proc., § 437c, subd. (m)(1).) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.,* subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact

necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Review of the ruling on summary judgment is de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) The trial court's denial of appellant's request for a continuance is reviewed for an abuse of discretion. (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023.)

2. Merits of the Motion for Summary Judgment

Appellant argues that respondents are vicariously liable for his injury because the Inn is respondents' agent. "An agency is either actual or ostensible." (Civ. Code, § 2298.) "Under the common law doctrine of respondeat superior, a principal or employer is vicariously liable for the acts of an agent or employee committed in the course of employment." (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1421; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 745-746.)

A franchisor may be vicariously liable if it has "'complete or substantial control over the franchisee.'" (*Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1288.) However, the "'mere licensing of trade names does not create agency relationships either ostensible or actual.'" (*Ibid*.) Summary judgment is appropriate in favor of a franchisor when a franchised restaurant denies service to a disabled person with a service dog, if there is no evidence that the franchisor exercises control over the restaurant and its employees. (*Pona v. Cecil Whittaker's, Inc.* (8th Cir. 1998) 155 F.3d 1034, 1036.)

a. Actual Agency

In the trial court, appellant argued that "there still must be a trial on the issue of weather [*sic*] the hotel was Hilton's agent." An actual agency exists "when the agent is really employed by the principal." (Civ. Code, § 2299.) Appellant offers no argument with respect to actual agency in his brief on appeal. The claim of actual agency is deemed to be abandoned. (*Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871, 883; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 984, fn. 1.)

b. Ostensible Agency

Appellant maintains that the trial court failed to consider ostensible agency when it granted respondents' motion for summary judgment. In his opposition to the motion, appellant asserted that Hilton "is legally responsible for the torts of another, even if that person is not an appointed agent, if the other was an ostensible agent." "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.)

Ostensible agency rests on the doctrine of estoppel: "'The essential elements are representations by the principal, justifiable reliance thereon by a third party, and change of position or injury resulting from such reliance [citation]. Before recovery can be had against the principal for the acts of an ostensible agent, the person dealing with an agent must do so with belief in the agent's authority and this belief must be a reasonable one. Such belief must be generated by some act or neglect by the principal sought to be charged and the person relying on the agent's apparent authority must not be guilty of neglect [citation].'" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 502; *Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399-400; *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 782; *Kaplan v. Coldwell Banker Residential Affiliates, Inc., supra*, 59 Cal.App.4th at p. 747.) The burden of proving ostensible agency is on the party asserting its existence. (*Ermoian v. Desert Hospital, supra*, 152 Cal.App.4th at pp. 502-503.)

Appellant's opposition to the motion for summary judgment addressed the issue of ostensible agency in an argument that is a little more than one page long. In it, appellant correctly noted the elements of reasonable reliance required for ostensible agency. Appellant then pointed to Daniel Powers' unawareness of whether or not he worked for

Hilton as evidence of ostensible agency, and as proof that "Plaintiff, and the public, logically believed the San Clemente hotel personnel were from Hilton."[3]

In his deposition testimony, appellant *expressly denied* that he selected the Inn in reliance upon respondents' apparent ownership or management. Appellant entered the Inn without any prior planning; therefore, he did not telephone Hilton or Promus to make a reservation. Asked, "Why did you pick that particular hotel?" appellant replied that "It was nice" and "It was in San Clemente." Appellant was specifically asked, "So did you or did you not pick the hotel because it was associated with Hilton and Promus?" Appellant answered "No." Similarly, in his declaration, appellant indicated that the only reason he went to the Inn was that it was down the street from the gas station where he purchased fuel: "After filling the vehicle up with gas we drove down the street toward the hotels. The Hampton Inn came up before the Travelodge, and it looked nicer than the Travelodge, so I pulled into the Hampton Inn parking lot."[4]

Apart from a lack of reliance on respondents' association with the Inn, appellant also fails to show what representations respondents made. "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts *of the principal* must be such as to cause the third party to believe the agency exists." (*Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 960, italics added.)

Appellant does not list any representations or acts *by the principal*, in this case, Hilton. Instead, in his declaration in opposition to the motion for summary judgment, appellant pointed to *his own beliefs*, but not to any representations made by Hilton. He wrote, "I believed there was no way [Hilton] would discriminate against my brother and

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3 When asked whether he ever worked for Hilton Hotels Corporation, Powers answered, "I worked for the Hampton Inn. . . . I don't believe they were corporately owned. So I don't know if I worked directly for them or not, to be honest with you."

4 In his opposition papers, appellant offers a copy of a web page showing that the Inn is "A proud member of the Hilton Family." However, the date on the web page is 2008, two years after the incident in question. Appellant could not have relied on this web page when he selected the Inn.

his service dog" and "I thought Hilton had implemented new anti-discrimination policies at its hotels. . . . I reasonably believed Hilton had already taken steps to retrain its employees and put an end to the discrimination."[5] We cannot extract from appellant's personal expectations or hopes any misleading representations or acts *by the principal* that would cause appellant to believe that the Inn was its agent.

In sum, there is no triable issue of fact as to either of appellant's causes of action. There is no evidence that the Inn's desk clerk was hired, trained, or supervised by respondents. Rather, the employee was hired, trained and supervised by QSSC, a franchisee that is not a party to this appeal. There is no evidence that respondents exercised any control over QSSC, let alone complete control. Powers' statement that "I don't know" if he worked for respondents does not create a triable issue, in the face of unrefuted evidence that he worked for QSSC. Absent evidence that QSSC and its employees were actual or ostensible agents of respondents, there is no vicarious liability.

3. Denial of Appellant's Request for a Continuance

Respondents filed and served their motion for summary judgment on March 7, 2008, in advance of a June 24 trial date. On April 28, 2008, appellant filed an ex parte application seeking a continuance. Appellant declared that he had been unable to locate and depose an essential witness, Daniel Powers, the Inn's desk clerk; however, Hilton had already given notice that Powers would be deposed on April 28, 2008. Appellant claimed that he did not have sufficient time to prepare for Powers' deposition and oppose respondents' motion for summary judgment. The trial court continued appellant's motion until May 2, reasoning that appellant "can get the information that he needs at the deposition this afternoon."

Respondents argued that appellant received Powers' contact information on March 3, 2008, before respondents filed their motion for summary judgment. Appellant made no effort to depose Powers. In addition, Powers' testimony was not essential,

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[5] This belief was based on Aaron Stites' pursuit of litigation against Promus "for over six years."

because the issue was whether respondents owned or operated the Inn. On April 28, Powers was deposed: appellant asked two hours 22 minutes of questions regarding an incident that lasted two or three minutes. Appellant asserted that "the deposition was started but not completed," and further discovery was needed. The court denied appellant's request for a continuance, but it permitted appellant to file an untimely opposition to the summary judgment motion.

The trial court must grant a continuance "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented . . . ." (Code Civ. Proc., § 437c, subd. (h).) A declaration in support of a request for a continuance must show: (1) facts will be obtained that are essential to opposing the motion; (2) there is reason to believe such facts exist; and (3) why more time is needed to obtain these facts. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254; *Ace American Ins. Co. v. Walker, supra*, 121 Cal.App.4th at p. 1023.)

The trial court did not abuse its discretion by initially continuing—and later denying—appellant's motion for a continuance. At the ex parte hearing on April 28, the court justifiably continued the matter because appellant was going to depose the witness whose testimony he sought *that very day.* Understandably, the court believed that appellant would obtain the information he needed to write his opposition to summary judgment. By the time that the court heard his motion on May 2, appellant had already deposed the witness whose testimony he desired. Toward the end of his examination, appellant was asking the witness questions that were simply irrelevant.[6] Appellant had ample opportunity to question the witness on topics germane to this litigation, so no additional time was needed to obtain facts.

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6 For example, appellant asked the witness "Do you know anybody or have friends that are college grads?", "Do you remember what color the [Inn's] carpet was?", "Do you know why carpets were put in the Hampton Inn?" and "Did your Human Resources class ever discuss the Freedom of Information Act?"

In any event, Powers' testimony was not necessary to determine the merits of respondents' motion, which was based on concepts of agency. As discussed in the preceding section, appellant failed to establish an agency relationship between respondents and the franchisee. Appellant argues that Powers' testimony led appellant to want to depose the Inn's manager. Yet appellant does not make an offer of proof that the testimony of the Inn's manager would have changed the outcome of the litigation: at most, the manager "is likely to contradict Powers, etc." It is of no moment whether the manager might contradict Powers, because neither Powers nor the manager can prove that appellant relied on an agency relationship between respondents and the franchisee.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.